

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLAIRE RANKINS,

No C 04-02379 VRW

Plaintiff,

ORDER

v.

JO ANNE B BARNHART, Commissioner
of Social Security

Defendant.

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Plaintiff Claire Rankins, acting pro se, appeals from the Social Security Administration ("SSA") decision to deny her social security disability benefits. The court now considers cross motions for summary judgment. Pl Mot (Doc #12), Def Mot (Doc #15). Based upon a review of the administrative record, the court finds that the Administrative Law Judge ("ALJ") did not provide sufficient justification for rejecting plaintiff's subjective complaints of pain. The court therefore GRANTS in part and DENIES in part plaintiff's motion and DENIES defendant's motion for summary judgment.

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3 Plaintiff is forty-nine years old and has an eleventh
4 grade education. Administrative Record ("AR") (Doc #7) at 879.
5 She worked as an office assistant for the California State Public
6 Utilities Commission from 1980 until April 30, 1997, the onset date
7 of her alleged disability. AR at 879, 121. She has not held
8 employment since that date. AR at 158, 879. She claims to be
9 physically disabled from carpal tunnel syndrome and pain in her
10 neck, lower back, hips, knee and hands. AR at 18, 158-63. She has
11 also produced evidence that she suffers from depression. AR at
12 419, 868. Plaintiff traces her neck, back and hip pain to a
13 collision with a file cabinet at work in December 1996. AR at 880-
14 82.

15 The medical records regarding plaintiff's alleged
16 impairments are voluminous and often conflicting. Many of the
17 records addressing plaintiff's physical condition come from Dr
18 Borina Dramov, a neurologist who treated plaintiff regularly from
19 April 1995 until at least June 2003. AR at 847. According to Dr
20 Dramov's most recent report, a Multiple Impairments Questionnaire
21 dated June 17, 2003, plaintiff suffers from a herniated lumbar
22 disc, lumbar radiculopathy and bilateral carpal tunnel syndrome.
23 AR at 848. Dr Dramov has also listed plaintiff as having bilateral
24 tenosynovitis, a cervical disc protrusion and degeneration in both
25 knees. AR at 781. Many of Dr Dramov's reports document
26 plaintiff's severe pain from these impairments, including lower
27 back pain that radiates into her legs, neck pain and pain in her
28 wrists and hands. See, for example, AR at 782-83, 848-49. From

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1 January 2000 to June 2003, Dr Dramov repeatedly described plaintiff
2 as permanently disabled. See, for example, AR at 774, 809, 852.

3 Plaintiff also visited a chiropractor regularly.

4 Plaintiff's treating chiropractor, Alireza Bagherian, reported that
5 plaintiff suffered from cervical myofascitis, cervical segmental
6 dysfunction, carpal tunnel syndrome, thoracic segmental
7 dysfunction, paresthesia/numbness or tingling, sacral segmental
8 dysfunction, hip pain and knee pain. AR at 835.

9 Other physicians who have examined plaintiff since the
10 onset date of her alleged disability have come to inconsistent
11 conclusions. In October 1997, Dr William Ross, an orthopedic
12 surgeon, diagnosed plaintiff with a chronic low back strain with
13 radiculopathy into lower extremities and chronic bilateral hand
14 tendinitis. AR at 414. According to Dr Ross, plaintiff had no
15 significant limitations and could engage in "any and all work
16 activities that are commensurate with age, training, and
17 experience." Id. In February 1998, Dr Arthur Auerbach, an
18 orthopedic surgeon, diagnosed plaintiff with residuals of a mild
19 chronic low back strain and left hip bilateral trochanteric
20 bursitis. AR at 663. Dr Auerbach found that plaintiff was able to
21 perform her regular workload. AR at 664. In May 2001, Dr Brian
22 Andrews, a neurosurgeon, found that plaintiff's gait was normal,
23 that she was not a surgical candidate and that it was hard to
24 understand physiologically why she would have radiating pain into
25 either leg. AR at 797.

26 A June 1996 MRI of plaintiff's right wrist showed
27 findings consistent with carpal tunnel syndrome. AR at 513. An
28 August 1997 MRI of both wrists showed no evidence of carpal tunnel

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1 pathology. AR at 674. A March 1999 MRI showed that plaintiff's
2 hips were normal. AR at 768. A February 1998 MRI of the left knee
3 showed a lesion of the medial meniscus. AR at 655. A December
4 1999 MRI of the lumbar spine showed a six millimeter protrusion of
5 the L5-S1 disc. AR at 810. A March 1999 MRI of the cervical spine
6 showed a two millimeter protrusion of the C5-6 disc. AR at 770.
7 July 2001 nerve conduction studies revealed no evidence of
8 radiculopathy, plexopathy or neuropathy in either lower limb. AR
9 at 865.

10 In addition to this evidence of plaintiff's physical
11 condition, the record includes the reports of several mental health
12 professionals. In March 1996, Dr Andrew Whyman performed a
13 psychiatric examination and found no evidence of anxiety or
14 depression. AR at 247. In August 1997, however, plaintiff sought
15 treatment after a suicide attempt and doctors prescribed Paxil. AR
16 at 403, 408. Although the Paxil helped plaintiff's symptoms,
17 plaintiff stopped taking it in 1997 or 1998. AR at 396, 887. In
18 October 1997, Dr Michael Zizmor examined plaintiff and diagnosed
19 her with chronic major depression, moderate, in partial remission.
20 AR at 419. But in an October 1997 psychiatric review technique, Dr
21 Robert E Lee found that plaintiff had no work restrictions, in part
22 because she had responded favorably to antidepressant drugs. AR at
23 432. In July 2003, plaintiff visited Carol Mills, a licensed
24 clinical social worker. AR at 868. Mills diagnosed plaintiff with
25 depressive disorder and generalized anxiety disorder and
26 recommended antidepressant medication. *Id.*

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In August 1997, plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income payments. AR at 121-23, 713-14. The SSA denied plaintiff's applications initially and on reconsideration. AR at 46, 52. After a hearing, the ALJ concluded in August 1999 that plaintiff was not disabled. AR at 83-84. Plaintiff appealed the decision to the SSA Appeals Council ("Appeals Council"). The Appeals Council granted review, vacated the decision and remanded the case with instructions to the ALJ to give further consideration to plaintiff's maximum residual functional capacity and to obtain supplemental evidence from a vocational expert. AR at 97-99.

A second ALJ held a hearing on July 29, 2003, at which plaintiff was represented by counsel. AR at 876. Plaintiff testified to numerous ambiguous pains and symptoms that she stated prevented her from being able to work. She described a sharp pinching pain in her neck. AR at 882. She also described severe pain in her lower back. AR at 882-83. Plaintiff testified that she could walk for an hour without too much pain, but she could only sit for one hour or stand for half an hour before it became too uncomfortable to continue. AR at 884-85. Plaintiff stated that she could not work as a parking lot attendant because she is sure that "a pain in [her] left leg" would "come over [her]". AR at 886. Finally, she claimed that due to carpal tunnel syndrome she had numbness, tingling and weakness in her hands that caused her to drop things. AR at 892.

Dr Louis Lesko, orthopedic surgeon, appeared as a medical expert at the hearing. Dr Lesko testified that plaintiff had

1 anomalous bones in her wrists as a result of a congenital condition
2 but that it was "questionable that [plaintiff] ever had carpal
3 tunnel syndrome". AR at 903-4. He testified that she had a
4 degenerative and modestly protruding L5-S1 disc in her lower back.
5 AR at 904-5. He also testified that plaintiff had a degenerative
6 tear of the posterior horn of the medial meniscus of the right
7 knee, but that this condition is commonly found in people "who are
8 asymptomatic and generally not much is required to be done about
9 it" unless the person is an athlete. AR at 911.

10 Dr Lesko found that plaintiff had a medium level residual
11 functional capacity and her only limitation was that she could only
12 perform keyboard work for two-thirds of the day because of the
13 anomalous bones in her hands. AR at 913. Based on this
14 conclusion, the vocational expert, Sidney Johnson, testified that
15 plaintiff could perform her past relevant work as an office
16 assistant. AR at 923.

17 On November 28, 2003, the ALJ issued a decision
18 concluding that plaintiff was not disabled. AR at 22-23. The ALJ
19 applied the five-step evaluation prescribed by the social security
20 regulations: (1) whether the claimant is currently engaged in
21 substantial gainful activity; (2) whether the claimant has a severe
22 impairment or combination of impairments; (3) if the claimant has a
23 severe impairment, whether the claimant has a condition which meets
24 or equals a condition appearing in the Listing of Impairments, 20
25 CFR § 404, Pt 404, Subpt P, App 1; (4) if the claimant does not
26 have such a condition, whether the claimant is capable of
27 performing her past work; and (5) whether the claimant has the
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1 residual functional capacity to perform any other work. 20 CFR §
2 404.1520.

3 The ALJ specifically found that: (1) plaintiff had not
4 engaged in substantial gainful activity since the alleged onset of
5 disability; (2) plaintiff had an impairment or combination of
6 impairments considered severe; (3) these impairments did not meet
7 or equal any of the listed impairments; (4) plaintiff's allegations
8 regarding her limitations were "not totally credible"; (5) careful
9 consideration was given to the medical opinions in the record
10 concerning the severity of plaintiff's impairments; (6) plaintiff
11 retained the residual functional capacity to perform the exertional
12 demands of medium work with inability to lift over twenty-five
13 pounds frequently. Due to carpal tunnel syndrome, plaintiff can
14 only perform keyboard tasks two-thirds of the day, but not
15 continuously; (7) plaintiff had past relevant work as an office
16 assistant; (8) plaintiff's impairments did not prevent her from
17 performing her past relevant work as an office assistant; (9)
18 plaintiff was not under a "disability" as defined in the Act at any
19 time through the date of decision. AR at 22-23.

20 The Appeals Council denied plaintiff's request for
21 review. AR at 10. Plaintiff began this action on June 16, 2004.
22 Complaint (Doc #1).

23

24 II

25 The court must uphold the SSA's decision to deny benefits
26 if it is supported by substantial evidence and is not based on
27 legal error. Andrews v Shalala, 53 F3d 1035, 1039 (9th Cir 1995).
28 Substantial evidence is "more than a mere scintilla but less than a

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1 preponderance; it is such relevant evidence as a reasonable mind
2 might accept as adequate to support a conclusion." Id. The ALJ is
3 responsible for determining credibility, resolving conflicts in
4 medical testimony and resolving ambiguities. Andrews, 53 F3d at
5 1039.

6 III

7 A

8 To receive benefits plaintiff must be under a disability.
9 42 USC § 423(a)(1)(d). Disability is defined as the "inability to
10 do any substantial gainful activity by reason of any medically
11 determinable physical or mental impairment which can be expected to
12 result in death or which has lasted for a continuous period of not
13 less than 12 months." 42 USC § 423(d)(1)(A). The impairment must
14 be of such severity that the individual "is not only unable to do
15 [her] previous work but cannot, considering [her] age, education,
16 and work experience, engage in any other substantial gainful work
17 which exists in the national economy." 42 USC § 423(d)(2)(A).

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19 B

20 The ALJ found that plaintiff was not disabled because her
21 depression did not rise to the level of a severe mental impairment
22 and because her "severe" physical impairments did not preclude her
23 from performing her past relevant work. Plaintiff, who is acting
24 pro se, has not pointed to any specific ALJ errors that warrant
25 reversal of the SSA's decision. Pl Mot (Doc #12). Upon its own
26 review, the court finds that the ALJ's conclusion that plaintiff
27 does not have a severe mental impairment is supported by the
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1 record, but the ALJ erred in failing to give legally sufficient
2 reasons for rejecting plaintiff's subjective complaints of pain.

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4 An impairment is not severe if it does not significantly
5 limit the claimant's ability to do basic work activities. 20 CFR §
6 404.1521. In this case, medical reports from Dr Whyman and Dr Lee
7 indicate that plaintiff's mental condition did not limit her
8 ability to work. AR at 247, 432. In addition, it appears that
9 medication helped any symptoms that plaintiff may have had. AR at
10 396. The ALJ noted that plaintiff stopped this treatment in 1997
11 or 1998. AR at 19. Finally, the ALJ provided specific reasons for
12 rejecting Carol Mills' report, which diagnosed plaintiff with
13 disabling depression. The ALJ rejected the report because it did
14 not come from an acceptable medical source, because it was
15 suspicious in its timing and because Mills had not seen plaintiff
16 for long enough to form a conclusive opinion. AR at 19.

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18 To find that plaintiff could perform her past relevant
19 work the ALJ adopted the opinion of the medical expert, Dr Lesko,
20 who testified that plaintiff's only limitation was that she could
21 only perform keyboard work for two-thirds of the day. The ALJ
22 found that the reports of plaintiff's treating physician, Dr
23 Dramov, and plaintiff's own testimony about her pain lacked
24 credibility.

25 Although the opinion of a treating physician generally
26 deserves more weight than the conflicting opinion of a non-treating
27 physician, the ALJ may give more weight to the opinion of the non-

1 treating physician so long as the ALJ gives specific reasons that
2 are supported by the record. 20 CFR § 404.1527(d)(2); Lester v
3 Chater, 81 F3d 821, 830 (9th Cir 1996). In this case, the ALJ
4 provided a specific and legitimate reason for questioning the
5 credibility of Dr Dramov's medical reports: the Medical Board of
6 California had placed her medical license on probation, after
7 initially revoking it, for incompetence and repeated negligence.
8 AR at 20-21, 214. This was documented in a published Medical Board
9 Action Report that Dr Lesko presented to the ALJ at the hearing.
10 AR at 214, 905-8.

11 The ALJ did not, however, provide legally sufficient
12 reasons for rejecting plaintiff's subjective complaints of pain.
13 Once a claimant has produced objective medical evidence of an
14 impairment that could reasonably be expected to produce the pain
15 complained of, the ALJ must consider the complaints in determining
16 disability. 20 CFR § 404.1529; Smolen v Chater, 80 F3d 1273, 1282
17 (9th Cir 1996). In evaluating the credibility of the complaints
18 the ALJ must consider: (1) the nature, location, onset, duration,
19 frequency, radiation and intensity of any pain; (2) precipitating
20 and aggravating factors; (3) the type, dosage, effectiveness, and
21 adverse side effects of any pain medication; (4) treatment, other
22 than medication, for relief of pain; (5) functional restrictions;
23 and (6) the claimant's daily activities. SSR 88-13; Smolen, 80 F3d
24 at 1284. If the ALJ ultimately rejects the complaints as lacking
25 in credibility, the ALJ must make specific findings stating clear
26 and convincing reasons for doing so. Smolen, 80 F3d at 1284.

27 The ALJ may not reject the complaints "based solely on a
28 lack of objective medical evidence to fully corroborate the alleged

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1 severity of the pain." Bunnell v Sullivan, 947 F2d 341, 345 (9th
2 Cir 1991). In Bunnell, an en banc opinion, the Ninth Circuit
3 reviewed two cases in which ALJs had rejected claimants' subjective
4 complaints of pain. Id at 342. In the first case, ALJs found that
5 the claimant had a severe impairment but rejected his allegations
6 of disabling pain because they were "not consistent with the
7 medical signs and findings" and were "not justified after thorough
8 and repeated medical evaluations." Id at 342-43. In the second
9 case, the ALJ rejected the claimant's allegations of pain because
10 they were not "supported by the medical evidence of record." Id at
11 343. The court found that the ALJs in both cases had erred by
12 rejecting the claimants' complaints solely because the medical
13 evidence failed to corroborate the severity of the pain alleged.
14 Id at 348.

15 At the hearing in this case, Dr Lesko did not mention any
16 of plaintiff's subjective complaints in his testimony on
17 plaintiff's residual functional capacity. AR at 903-22. According
18 to Dr Lesko, plaintiff did not have any limitations other than the
19 anomalous bones in her wrists that prevent her from typing
20 continuously. AR at 913. The vocational expert based his
21 conclusion that plaintiff could perform her past relevant work
22 entirely on Dr Lesko's assessment. AR at 922-23. Nothing in the
23 vocational expert's testimony indicates that he considered any of
24 plaintiff's pain testimony.

25 The ALJ found that plaintiff had several severe
26 impairments, which necessarily includes a finding that plaintiff
27 presented objective medical evidence of these impairments. See 20
28 CFR § 404.1508 (in order to prove an impairment the plaintiff must

1 present objective medical evidence). The ALJ then adopted the
2 findings of Dr Lesko and the vocational expert as to plaintiff's
3 residual functional capacity. The ALJ's only reference to
4 plaintiff's pain testimony is a paragraph in which the ALJ refers
5 to plaintiff's statements as "not completely credible, considering
6 the differences between the statements and the information
7 contained in medical reports." AR at 20. In support of this
8 statement the ALJ points to several of these reports. AR at 20.
9 First, the ALJ cites an August 1997 MRI of both wrists that showed
10 no evidence of carpal tunnel pathology and a 1991 MRI of the hip
11 that was negative. Id. Second, the ALJ cites Dr Andrews' surgical
12 consultation in May 2001, which found that plaintiff's gait was
13 normal, that she was not a surgical candidate and that it was hard
14 to understand physiologically why she would have radiating pain
15 into either leg. Id. Finally, the ALJ points to July 2001 nerve
16 conduction studies that revealed no evidence for radiculopathy,
17 plexopathy or neuropathy in either lower limb. Id.

18 In sum, there is no indication that the ALJ considered
19 any of the factors set out in SSR 88-13 in evaluating plaintiff's
20 testimony. Nor is there evidence that the medical expert or
21 vocational expert included the testimony in their findings. The
22 only reference to plaintiff's complaints is the ALJ's cursory
23 finding that they were not credible because the objective medical
24 evidence failed to support them. In effect, the ALJ's statement
25 that plaintiff's complaints were "not completely credible,
26 considering the differences between the statements and the
27 information contained in medical reports" is strikingly similar to
28 specific statements the Ninth Circuit found to be inadequate in

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1 Bunnell. AR at 20. According to Bunnell, this is not a legally
2 sufficient reason for rejecting the testimony.

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4 C

5 The final remaining issue is whether, given the ALJ's
6 error, the court must remand for an immediate award of benefits.

7 The district court should credit improperly rejected
8 evidence and remand for an immediate award of benefits if (1) the
9 ALJ failed to provide legally sufficient reasons for rejecting the
10 evidence; (2) there are no outstanding issues that must be resolved
11 before a determination of disability can be made; and (3) it is
12 clear from the record that the ALJ would be required to find the
13 claimant disabled were such evidence credited. Benecke v Barnhart,
14 379 F3d 587, 593 (9th Cir 2004). On the other hand, the court
15 should remand for further administrative proceedings if after
16 crediting the improperly rejected evidence the record is still
17 unclear as to whether the plaintiff is disabled. See Harman v
18 Apfel, 211 F3d 1172, 1179-80 (9th Cir 2000)(upholding remand for
19 further proceedings where crediting improperly rejected opinion of
20 claimant's treating physician did not establish disability as a
21 matter of law).

22 In this case, remand for further administrative
23 proceedings is appropriate because it is not clear that plaintiff
24 would be disabled even if her testimony were credited as true. In
25 the first place, the vocational expert did not consider any of
26 plaintiff's pain testimony or her stated limitations in his
27 assessment. This is not a valid reason for further administrative
28 proceedings if the discredited testimony clearly shows an inability

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1 to perform any substantial gainful work. Benecke, 379 F3d at 595.
2 But such clarity is not present here because plaintiff's testimony
3 regarding her limitations is ambiguous and incomplete. For
4 example, plaintiff testified that pain prevents her from standing
5 for more than half an hour or sitting for more than an hour, but
6 she did not describe the nature, severity or location of the pain
7 that causes these limitations. AR at 883-85. She stated that she
8 could not work as a parking lot attendant, a job in which she could
9 move around, because she is sure that she would have "a pain in
10 [her] left leg". AR at 886. When asked what she would do if she
11 was sitting and got the pain, she stated that she would change her
12 sitting position, massage the leg and take her medication. AR at
13 887. She stated that her pain medications, Vicodin and Naprosyn,
14 do not help her. AR at 898-900. But she also testified that she
15 takes the medications often and that they alleviate her pain. *Id.*
16 This testimony is insufficient for the court to conclude that
17 plaintiff cannot perform any substantial gainful work. Thus,
18 further consideration of the extent of plaintiff's pain and whether
19 this pain renders her disabled is necessary.

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IV

22 For the foregoing reasons, the court DENIES defendant's
23 motion for summary judgment (Doc #15) and GRANTS in part and DENIES
24 in part plaintiff's motion for summary judgment (Doc #12). The
25 ALJ's determination is vacated and the action remanded for further
26 proceedings consistent with this order.

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1 The clerk is directed to close the file and terminate all
2 pending motions.

IT IS SO ORDERED.

Walker
VAUGHN R WALKER
United States District Judge

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